IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 427

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), An Unincorporated Labor Organization, and MICHAEL VOLK, An Individual,
Petitioners,
vs.
PAUL S. RUSSELL,
Respondent

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE FIRST FEDERAL QUESTION—CONGRESSIONAL REGULATION OF RIGHTS PLUS PROVISION OF A SPECIFIC REMEDY TO PROTECT AND REGULATE THESE RIGHTS CONSTITUTE A COMPLETE SCHEME OF REGULATION HAVING ALL THE CRITERIA OF FEDERAL PREEMPTION. NATURE OF THE CONDUCT INVOLVED IS NOT DETERMINATIVE.

This was not a suit for damage to plaintiff's automobile or other property, for damages because of personal injuries or assault and battery, for damages because of

false arrest or imprisonment, or for any other type of damages disassociated from interference with the right to work during a strike. The subject matter adjudicated was the identical subject matter over which the National Labor Relations Board is given jurisdiction and authority to adjudicate by Sections 7 and 8 (b) (1) of the Act—that is, the protection and interrelation of an *employee's* right to work during a strike without interference by a labor organization or its agents and the right of employees to strike and picket.

Respondent contends that the Federal question involved here was adjudicated adversely to Petitioners in *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656.

As was pointed out in the Petition for Certiorari, the National Labor Relations Act, as amended, neither regulates nor protects the *employer* rights adjudicated in the *Laburnum* case, nor does it supply a remedy parallel to that exercised by the state court in that case. Section 7 of the National Labor Relations Act protects the rights of *employees*, not employers. Section 8 (b) (1) (A) of the Act condemns the infringement of these rights and Section 10 of the Act provides an administrative remedy, with ultimate resort to the courts, in event of alleged infringement.

The Act thus protects the rights of employees to work during a strike against impairment by any means, including actual or threatened violence, and provides a remedy for the enforcement of this right.

It does not protect the right of an employer to engage in his business or occupation against similar infringement and provides no remedy to an employer which he may pursue in the event the operation of his business is interfered with in parallel instances.

True, an employer may file a charge that an unfair labor practice has been committed and thereby put in motion the investigative machinery of the Board, but in so doing, a charge of violation of Section 8 (b) (4) (by whomever filed) will put in motion only machinery designed to protect and vindicate the rights of employees. No machinery designed to protect the parallel rights of the employer is provided by the Act.

The decisions of this Court make it abundantly apparent that it is the creation or protection of rights and the provision by Congress of a remedy, or machinery, to enforce the rights thus created or protected, which constitute the criteria for the determination of whether the Congressional regulation is exclusive and that the source or means of interference with these rights is immaterial.[1] *Garner v. Teamster's Union*, 346 U. S. 485, 490.

The existence of actual or threatened force or violence has never been held to be determinative in the solution of the problem of jurisdiction. This case, like the *Garner* case but unlike the *Kohler* case,[2] does not involve the exercise of emergency powers of the state to maintain law and order, but involves solely (to reiterate the petition for certiorari) the interbalancing of the rights protected by Section 7 of the Act—that is, the right of employees to strike and the right of employees to work in the face

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[1] "It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the Congressional power. Acts having that effect are not rendered immune because they grew out of labor disputes. * * * It is the effect upon commerce, not the source of the injury, which is the criterion." *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 31.

[2] *United Automobile, Aircraft, and Agricultural Implement Workers of America v. Wisconsin Employment Relations Board and Kohler Company*, — U. S. —; 76 S. Ct. 794.

of a strike. This function has been committed by Congress to the National Labor Relations Board. The Board has no jurisdiction to award damages in the form of lost profits or for physical injury to property of an *employer*, but it does have the express power to adjudicate the rights of *employees* to strike and to refrain from striking and to provide such relief to employees as it may deem necessary to protect the rights entrusted by Congress to its expert custody. Among the various forms of relief which the Board may formulate is the award of back pay due because of interference with employment. Congress has "prescribed (this) procedure for dealing with the consequences of (this) tortious conduct already committed." *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 665. (Words in parenthesis supplied.)

The power of Congress over interstate commerce and matters which affect or burden commerce is plenary and is as broad as the police powers of the states. *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1; *Gibbons v. Ogden*, 9 Wheat. 196.

> "The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of one legislature may be in direct collision with that of the other. This will is to be discovered, as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared, that the punishment for disobedience of the act of Congress, shall be a certain fine; if that provided by the State legislature for the same offense be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution; and may be said, therefore, not to be repugnant to it. But surely

the will of Congress is, nevertheless, thwarted and opposed.

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"* * * Congress has exercised the powers conferred on that body by the Constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised."

Houston v. Moore, 5 Wheat. 1, 21-23, Justice Washington speaking for the Court.

This Court has often held that when Congress undertakes to legislate on a subject, it must be presumed that the Congressional regulations go as far as Congress "thought right;" and State regulation or action which goes further than the Congressional regulation (by imposing staggering punitive damages, for example), even though it be not incompatible with the Congressional regulation in its intent and purpose, is nevertheless necessarily inconsistent with and contradictory of the judgment of Congress as to how far the regulation should go. *Amalgamated Association of Street, etc., Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383.[3]

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[3] "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a State law is not to be declared a help because it attempts to go further than Congress has seen fit to go." *Charleston and Carolina Railroad v. Varnville Company*, 237 U. S. 597, 604.

"Congress must be deemed to have determined that the rule laid down and the means provided by the Cormack and Cummins amendments to the Interstate Commerce Act to enforce it are sufficient and that no other regulation is necessary. Its power to regulate such commerce * * *

(Continued on next page)

This Court has also in many and varied instances and applications held that rights of action accruing to individuals under the common law of a state are superseded by acts of Congress regulating interstate commerce. E. g., *Western Union Telegraph Company v. Speight*, 254 U. S. 17; *Texas and Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S. 426:

> "* * * it is for Congress to determine how the rights which it creates shall be enforced. * * * In such a case the specification of one remedy normally excludes another."
>
> *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 301.

Where Congress has, as here, provided an administrative remedy, such remedy is exclusive and must be exhausted before any resort to the courts, state or federal, may be had. *Aircraft Corporation v. Hirsch*, 331 U. S. 752, 767, 768, and cases cited.

(Continued from preceding page)

is supreme; and as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to, or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction." *Missouri Pacific Railroad Company v. Porter*, 273 U. S. 341, 345.

"* * * where the United States exercises its power of legislation so as to conflict with a regulation of the State, either specifically or by implication, the State legislation becomes inoperative and the Federal legislation is exclusive in its application." *Cloverleaf Butter Company v. Patterson*, 315 U. S. 148, 156.

II.

SECOND FEDERAL QUESTION

Since this was not a case of a common law tort (such as for assault) as to which any damages were recoverable without a showing of an actual loss of work, it was essential to the plaintiff's case that he prove, as one of the elements of his evidence, that work would have been available to him had he entered his place of employment. Charge 9, given by the trial court at the request of the plaintiff and approved by the Supreme Court of Alabama, omits from its hypothesis the instruction that the jury must find that work was available before a verdict would be authorized for the plaintiff. The charge thus authorizes a verdict to be rendered against the defendants on the hypothesis that the bare exercise of the federally protected right to strike may be subjected to a penalty of damages. Such is erroneous and the jury would have been authorized to return a verdict under this charge alone, without regard to the other charges given by the Court. The Supreme Court of Alabama did not place its opinion as to this charge upon the basis that the giving thereof was a harmless error in the light of other charges, but, to the contrary, placed its stamp of approval on the charge which by its terms deprived the defendants of a Federal right. (R. 705; Appendix B, p. 24a.)

III.

THIRD FEDERAL QUESTION AND THE INSUFFICIENCY OF THE EVIDENCE

The Respondent points out on pages 10 and 11 of the Brief in Opposition to the Petition for Writ of Certiorari that the trial court in the conduct of the trial charged the jury upon the Federal right of the defendants to strike and to picket. These are the rights which Congress has committed to the jurisdiction of the National Labor Relations Board together with the right of the plaintiff to refrain from striking and to work during a strike. The preamble to the Labor Management Relations Act of 1947 (29 U. S. C., Sect. 141 (b)) states that the interbalancing of these rights is the very purpose of the existence of the National Labor Relations Board. The very necessity for the trial court to charge the jury upon their duty to protect these rights of defendants points up with abundant clarity the conflict in jurisdiction which exists when these rights are committed to the protection of the thousands of trial courts throughout the nation rather than retained exclusively in the breast of the Federal agency which has been established for their protection and regulation. Uniformity in the effectuation of the policy and will of Congress cannot be attained before the diversified view points of trial courts and juries but can only be attained before a centralized agency. *Garner v. Teamster's Union*, 346 U. S. 485; *Amazon Cotton Mills Company v. Textile Workers Union*, 167 F. 2d 183.

The giving of lip service to these Federal rights does not guarantee their existence under the rules of the Agency to which they were committed by Congress. Especially is this true where there was no evidence to show that any actual damages were sustained by the plaintiff in the form of lost wages.

Respondent attempts to divert the attention of this Court away from the lack of evidence in this regard by arguing, just as it did in the Supreme Court of Alabama, that the evidence was in conflict on the question of an "agreement" on the part of the company not to operate its plant during the strike. It is true that the evidence was in conflict as to whether or not an explicit agreement had been made. By this argument the attention of the Supreme Court of Alabama was diverted away from the fact that there was no evidence to show that any work would have been offered to plaintiff had he entered the plant during the strike, and away from the mass of facts which show clearly that, explicit "agreement" or no, the company had no desire to, and made no attempt to, operate the plant after the time its agents saw the picket line being established on the morning the strike began. As soon as the picket line was seen and before it was time for the first shift of employees to report to work, the company began its preparations to close.

Respondent, on pages 12 and 13 of his brief, indulges in criticism of the brief mention which is made of these facts in the Petition for Certiorari. Fifty-One (51) per cent of the employees in the production division of the plant alone voted in April for the Union. These were in addition to the almost unanimous vote of the maintenance division of the plant a year earlier (R. 184). The evidence is uncontradicted that in July (three full months after the last election) over 400 of the employees voted to go on strike and that this number was such that, in the knowledge of the plaintiff, the company could not have operated the plant with the remainder.

Criticism was also indulged as to the comments of Petitioners upon the testimony of Howard Babis, company foreman, and it is stated that no testimony found in the

record supports these comments. The testimony is set out in the footnote below.[4]

Reference is made on page 14 of the Brief in Opposition to a practice of the company to notify all employees when the plant was to be shut down, by placing notice on bulletin boards. This practice was in effect when the plant closed down for lack of work, for vacations, or for repairs. Its admissibility for the purpose of showing what might be the practice in the case of a strike was objected to by the defendants. Mr. Oakes testified that the company was not advised of the exact time when the strike would begin (R. 601). A notice could hardly be placed on the bulletin board to advise employees of the beginning of the strike when the company did not know the date or the time of the impending strike. As mentioned previously, as soon as the company was advised of the date and time by seeing the picket line assembling it began its preparation to close the plant immediately.

All employees were requested by the union to report at the picket line on the morning that the strike began in order that picket schedules might be established (R. 544). It was the employees who were going on strike, not the International Union. Their acute personal interest

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[4] "Q. Did Oakes or other top officials of the company advise you of the agreement that the company made with the union on July 17 that the plant would be closed for the duration of the strike to all hourly paid employees?

"A. That the plant would be closed—the terminology I am not sure" (R. 307, 308).

* * * * *

"Q. I will ask you the question again: Were you advised of an agreement between the union committee and the company that the company would remain closed for the duration of the strike to all hourly paid employees?

"A. I was told there would not be any work because of a discussion between the company and the union" (R. 308).

and their morale were sufficient causes for them to be present at the inception of the strike without regard to any other factors whatsoever.

There was no actual violence in this strike until after five weeks; when the plaintiff and others induced the company to re-open. As a part of its preparations to re-open the company attempted to bring in copper and, regrettably, the emotions of the employees, who saw five weeks of privation going to waste, prevailed over reason at a time when no representative or agent of the Petitioners was present. Yet Respondent sued for wages allegedly lost *during* the five week period preceding the opening of the plant.

No evidence shows any request of the company for injunction or for protection by law enforcement officials until around August 20, 1951, when, in response to plaintiff's back-to-work petition, it sought to break the strike and the State Highway Patrol was procured to be present for this purpose.

IV.

CONCLUSION

Congress has entrusted the important function of weighing in balance the rights involved in this case to the dispassionate investigative and remedial powers of the National Labor Relations Board. The adroitness of counsel for the Respondent in the art of engendering passion in the minds of a jury is illustrated by the Conclusion of their Brief in Opposition. The will of Congress that the rights of employees should be dispassionately administered by an expert tribunal cannot help but be thwarted when

such adroitness is brought to bear upon jurors who have no understanding of these rights or of the policies which Congress thought essential to the national welfare.

Respectfully submitted,

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